1221-90-G Teamsters Local Union No. 91, Applicant v. **Farry Excavating & Grading Ltd.,** Respondent

BEFORE: *Owen V. Gray,* Vice-Chair, and Board Members *M. Vukobrat* and *J. Kurchak.*

DECISION OF OWEN V. GRAY, VICE-CHAIR AND BOARD MEMBER J. KURCHAK; April 24, 1991

1. Farry Excavating & Grading Ltd. ("Farry") is an excavation contractor. In the summer of 1990, it performed excavation at and moved excavated material on and from a construction site in Ottawa described in these proceedings as "the Green Creek project." It did that pursuant to a contract with a general contractor, who was building a sewage treatment plant on the site.

2. The applicant ("Local 91") claims that Farry's employment of the dump truck drivers to move excavated material on and from the Green Creek site was covered by the provincial agreement ("the Teamsters provincial agreement") between the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and the Teamsters Construction Council of Ontario (collectively, "the Teamsters employee bargaining agency") and the Construction Site Teamster Employer Bargaining Agency. As the affiliated bargaining agent of the Teamsters employee bargaining agency with jurisdiction in the Ottawa area, Local 91 grieves that the respondent ("Farry") breached that agreement by failing to apply its provisions to that employment. That grievance has been referred to this Board for arbitration under section 124 of the *Labour Relations Act* ("the Act").

3. By its terms, the Teamsters provincial agreement applies to the employment of "all on-site Teamsters for whom the Union has bargaining rights in the ICI Sector of the Construction Industry in the Province of Ontario", with certain exceptions which are not in issue here. Farry concedes that it is bound by this agreement, but denies that it applies to its employment of dump truck drivers in connection with the Green Creek project. In particular, it denies that those truck drivers were "on-site Teamsters" or that they were employed in the construction industry or, if employed in the construction industry, that they were employed in the industrial, commercial and institutional ("ICI") sector of the construction industry.

4. One of the points in issue between the parties is whether the construction of a sewage treatment plant is construction in the ICI sector of the construction industry. When this referral came on for hearing they agreed to defer determination of that issue (and issues relating to whether there has been a breach and what remedy any such breach should attract) and asked that the Board first decide the following question:

> Assuming without conceding that the construction project in question falls within the ICI sector of the construction industry, is hauling excavated material on and from the project covered by the terms of the Teamsters provincial agreement?

This seemed a sensible way to proceed. Having since heard and considered their evidence and argument on that question, we now set out our answer to it.

5. When Farry is engaged as an excavation contractor, some of its employees (the "operators") use excavating equipment to dig the hole or holes into which other contractors will later

place some structure. The operators put the excavated material into dump trucks driven by other Farry employees (the "drivers"). The drivers may move that material to another part of the site. More often, however, they move the excavated material away from the site to some place where it can be dumped. Such dump sites can be at some distance from construction sites. As a result, the drivers spend a great deal of their time on public streets and highways travelling between construction sites and dump sites.

6. This is the sort of work Farry was doing when, in August 1988, Teamsters Local Union No. 230 applied under the construction industry provisions of the Act for certification with respect to a unit of Farry's drivers. As amended in September 1988, that application covered the usual Teamsters construction industry unit, which the Board described this way when it granted the application:

> all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham employed as Teamsters engaged in on-site construction, save and except non-working foremen and persons above the rank of non-working foreman.

(The Board also expressly excluded "persons covered by the subsisting collective agreement between the respondent and the International Union of Operating Engineers, Local 793.") In so far as it concerned the ICI sector, this certification conferred bargaining rights on all of the affiliated bargaining agents of the Teamster employee bargaining agency, including Local 91.

7. Farry Longo is the owner and President of Farry Excavating & Grading Ltd. He testified that after the drivers were organized, when he complained he could not afford to pay the rates set out in the Teamsters provincial agreement, officials of Local 230 said he should agree to be bound by the terms of that Local's comprehensive, all sector agreement with Rumble Contracting Limited and other members of the Associated Earthmovers of Ontario ("the Rumble agreement"). They told him that he would not have to pay the rates in the ICI agreement if he did that, that consistent with that Local's treatment of the other signatories to the Rumble agreement, it would only require him to pay his drivers the lower rates in the Rumble agreement, regardless of the sector in which the drivers were being employed. The Rumble agreement covers "all drivers in the employ of the Employers in the Labour Relations Board Area Number eight (8) and Board Area Number nine (9)." Farry agreed to be bound by that agreement. Thereafter, and without complaint by Local 230, Farry paid its drivers the rates set out in the Rumble agreement for all work, including hauling excavated material on and from ICI construction sites.

8. The Green Creek contract was Farry's first venture in the Ottawa area, which is beyond the geographic scope of the Rumble agreement. The general contractor had invited Farry to bid on that job because, it said, prices in Ottawa from local contractors were "inflated." It was originally anticipated that none of the material to be excavated on the Green Creek site could be used as backfill, so that all of it would have to be removed from the site. As the work proceeded, however, 10 to 15 percent of the excavated material was found to be suitable for backfill and was retained on site. Farry trucks moved it from the excavation to another part of the site about 400 metres away.

The other excavated material was taken to one of three sites: a regional landfill site about 75 minutes' drive (one way) from the construction site, an abandoned gravel pit 40 minutes' drive from the site and a residential subdivision 20 to 25 minutes' drive from the site. It did not take more than a few minutes to load a dump truck on site. Consequently, drivers assigned to take loads to one of these off-site locations spent most of each working day off-site.

9. Counsel for the employer called Andrew Pilat to testify with respect to "practice" and the negotiation history of the Teamsters provincial agreement. Mr. Pilat has been General Manager of the Sarnia Construction Association since 1982 and Chairman of the Construction Site Teamster Employer Bargaining Agency since 1984. Counsel for Local 91 objected to the introduction of that evidence. We received it on the basis that we would determine later what weight it should be given, if any.

10. Mr. Pilat testified that he believes that the Teamsters provincial agreement applies to teamsters only while they are doing exclusively on-site work, like hauling excavated material from one point to another on site or acting as on-site warehousepersons, and not to drivers hauling excavated material from a construction site to off-site locations. He judged that there were very few occasions when drivers were covered by the agreement, because very few employers have remitted the industry fund levy which the provincial agreement requires them to pay the Employer Bargaining Agency when they have employees covered by the agreement.

11. Mr. Pilat testified that all members of the Sarnia Construction Association were bound by the Teamsters provincial agreement. He was aware of 10 to 12 other employers in the province who were also bound, but did not claim to have an exhaustive list. He said his experience in the Sarnia area was that when hauling of excavated material away from ICI sites was required, it was generally subcontracted to owner operators or small contractors who were party to collective agreements with the local Teamsters union, and that the drivers doing that work were dealt with in accordance with the terms of local collective agreements covering other sectors and not those of the ICI agreement. He could only think of one bound employer who might have contracted to do work in the Ottawa area of the sort in question here, and thought that employer would have subcontracted that work. He mentioned at least two projects on which he thought a bound employer who had not remitted any industry fund levy must have employed teamsters covered by the provincial agreement. He did not suggest he had made any effort to investigate whether bound employers had been obliged to but failed to pay industry fund levy.

12. Mr. Pilat said that he had been involved in the negotiation of the Teamsters provincial agreement in one capacity or another since the 1980 negotiations. He testified about a proposal of the union in those 1980 negotiations that the language of subcontracting clause be changed. He thought that proposal would have enlarged the scope of the agreement. He did not suggest that the proposal expressly addressed or raised a question about the status of employees hauling excavated material to off-site locations, nor that in or while making it the union had conceded that such employees were not covered by the existing agreement. He also testified that in the 1982 and 1988 negotiations, the union sought a provision requiring that suppliers of materials be in contractual relations with the union. The language of the 1988 proposal was this:

> all delivery of materials such as steel, aggregates, ready-mix concrete, etc., to or from those construction sites covered by this agreement as listed in Article 1 Section 1.1 will be done by company's [sic] who have a contractual relationship with the teamsters union.

Again, Mr. Pilat did not suggest that the status of drivers hauling excavated material to off-site locations was specifically discussed during those negotiations.

13. The status of drivers hauling excavated material to off-site locations became an issue in the 1990 negotiations as a result of a grievance filed against another contractor (Van Bots) prior to those negotiations. One of the matters put in dispute in that grievance was whether drivers hauling excavated material to off-site locations fell within the scope of the Teamsters provincial agreement. As a result, when negotiations began the union proposed that the scope clause be amended to substitute "on and off site" for "on site" in the scope clause. The union also proposed language expressly stating that the agreement applied to drivers hauling excavated material on and off-site without regard to whether the drivers spent a majority of their time on the site. On the evidence, neither of these union proposals amounted to or was accompanied by a concession that the agreement would not otherwise apply to drivers of the sort in question here. Indeed, the last mentioned proposal was expressly made without prejudice to the union's position that such drivers were already covered by the language of the agreement.

14. The union called Albert Marinelli to testify in reply to the evidence of Mr. Pilat. He has served as the International Union's Director of Construction for Canada since 1977. He has been a participant in the bargaining of the Teamster's provincial agreement since the inception of provincial bargaining in 1978. Indeed, he testified that he was involved in applying for the Ministerial designation of the Teamster employee bargaining agency. Counsel for the respondent objected to his being asked any questions about that application; in the face of that objection, (and without our having ruled on it) counsel for the union chose not to ask questions in that area.

15. It was Mr. Marinelli's evidence that the union felt that drivers hauling excavated material from ICI projects to off-site locations were within the scope of the Teamster's ICI agreement and that the union had never conceded otherwise in collective bargaining. He acknowledged that the union was content to have excavation contractors employ drivers in accordance with the terms of a local agreement covering other sectors when, as he understands it, the labourers' and operating engineers' unions do the same thing by way of schedules to their provincial agreements. He said that to his knowledge, the union and its locals had not sought to enforce the ICI agreement against any employer who was employing its members to do ICI work and was applying the terms of a local agreement covering other sectors.

16. On the evidence of both Mr. Pilat and Mr. Marinelli, the first time the applicability of the Teamsters provincial agreement to hauling of excavated material to off-site locations was formally discussed at the provincial bargaining table was during the 1990 negotiations. A number of proposals were exchanged which would have accommodated application of the terms of local agreements covering work of this sort in other sectors to such work when performed in the ICI sector. No agreement was reached.

17. Counsel for Farry argues that the question here is whether the phrase "on-site Teamsters" applies to drivers hauling off site. She says that "on-site" is unambiguous and cannot apply to those drivers. If "on-site" is ambiguous, she says, then past practice and the behaviour of the Teamster employee bargaining agency in collective bargaining show that the provincial agreement has not been understood or treated as applying to hauling excavated material off site.

18. Counsel for the union argues that the scope of the collective agreement is determined by the Minister's designations under section 139 of the Act and the definition of "construction industry" in clause 1(1)(f) of the Act. He submits that "on-site Teamsters" in the collective agreement means the same as "teamsters engaged on on-site construction" in the designation of

the employee bargaining agency. He argues that the adjective "on-site" imports the same qualification as the phrase "at the site thereof" in the statutory definition of "construction industry." That does not require that an employee be at the site continuously in order to be employed "in the construction industry" or "on on-site construction." Because of the requirements of the province-wide bargaining provisions of the Act and particularly section 146, he argues, the beliefs and behaviours of those affected by the agreement cannot alter its scope, nor can they assist in interpreting those provisions of the agreement which define its scope. He argues that the drivers engaged in hauling excavated material from an ICI construction site are employed in the ICI sector of the construction industry all the time they are engaged in that task, not just while they are physically on the construction site.

19. The literal interpretation of "on-site Teamsters" suggested by the respondent has a certain superficial attractiveness. Its attraction fades considerably, however, when one considers the context to which the applicant refers. In that context, the literal interpretation requires a finding that in 1978 either the Minister of Labour determined that the Teamsters Union and its locals could not henceforth represent in collective bargaining drivers of the sort in question here, or the participants in provincial bargaining deliberately excluded from coverage drivers about whose employment they were obliged to bargain.

20. Clause 1(1)(f) of the Act provides that

> "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof;

The Board first considered the language of what is now clause 1(1)(f) in *Cedarhust Paving Co. Limited*, [1964] OLRB Rep. Dec. 442 (sometimes cited as "Cedarhurst Paving Co. Limited"). That was an application by Teamsters Local Union No. 230 for certification under the construction industry provisions of the Act for an "all drivers" unit. The respondent to that application argued that the unit should be limited to dump truck drivers engaged on construction sites. Unlike the case before us, the respondent there conceded that dump truck drivers would not have to be continuously engaged on a construction site in order to fall within the bargaining unit.

21. The Board found the concession appropriate. It noted that the "at the site" language in the definition of "construction industry" focuses on the activity of the business rather than that of the individual employee engaged in that business. It also observed that

> …..it seems reasonable to conclude that before an employer can be said to be operating a business in construction of "works" at the site thereof, he must have employees at work on the site. But it also seems reasonable to conclude that in the operation of the business at the site, employees may from time to time have to leave the site to perform work in connection with the work at the site. Further, the operation of the business at the site may well include the use of employees in transporting materials and equipment to the site, even though these employees are not, in one sense, directly involved in "on site" work.

The parties had also agreed, and the Board found, that drivers engaged in transporting materials or equipment to third parties would not be covered by a construction industry application. That is consistent with subsequent decisions of the Board: *Ethier Sand & Gravel Ltd.,* [1979] OLRB Rep. Oct. 962; *Canadian Road Asphalts Ltd.,* [1980] OLRB Rep. Mar. 299; *Maitland Redi-Mix Concrete Products Limited,* [1980] OLRB Rep. Dec. 1751.

22. In *Cedarhust,* the parties disagreed about whether drivers of float trucks, service trucks and gas trucks were employed in the construction industry within the meaning of the Act. The Board found that they were. In coming to that conclusion, it applied this test:

> If the operations or services performed by these drivers are regarded as an integral and necessary part of the business of the respondent in constructing, altering or repairing roads at the site, then in our view the wording of the definition of construction industry in section 1(1)(da) [now 1(1)(f)] is wide enough to include such employees under the construction industry provisions of the Act.

23. The *Cedarhust* decision formed the basis on which the Board thereafter distinguished between drivers who fall within a construction industry bargaining unit and those who do not: see *K.J. Beamish Construction Co. Limited,* [1964] OLRB Rep. Dec. 398; *Drope Paving Construction Limited,* [1966] OLRB Rep. June 190; *Bergman & Nelson Limited,* [1966] OLRB Rep. June 190; *McDougall-Walbridge-Aldinger (Ontario) Limited,* [1966] OLRB Rep. Nov. 594; *Keystone Contractors Limited,* [1967] OLRB Rep. June 233; and, *Matthews Group Limited,* [1969] OLRB Rep. Mar. 1299. Before 1978, when the Legislature imposed provincial bargaining in the ICI sector, certification decisions ordinarily made no reference to "sector" and teamster bargaining units in construction industry certification applications were typically described in terms of "all truck drivers in the employ of the respondent" in a particular Board area: see *Boston Excavating & Grading Company Limited,* Board File No. 1648-75-R, unreported decision dated February 18, 1976, and *Active Excavating & Contracting Limited,* Board File No. 0825-76-R, unreported decision dated August 12, 1976.

24. There can be no doubt that in performing the excavating contract at the Green Creek site, the respondent was operating a business in the construction industry. Removal of excavated material from the construction site was an integral and necessary part of that business. In our view, the drivers who drove that material to places where it could be dumped were employed in the construction industry both while they were on the construction site and while they were off site travelling between the construction site and a dump site.

25. We are supported in that conclusion by clause 117(b) of the Act, which was added to the Act in 1970, and provides that

> "employee" includes an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining with on-site employees.

This provision reinforces and, perhaps, extends the approach the Board took in *Cedarhust.* It makes it clear that it is the employer's business which must be engaged in construction of works "at the site thereof' and that while an employee must have a connection with that on-site work or with the employees doing it, the connection is not necessarily broken when the employee is away from the site. We also note that in *Canadian Road Asphalts Limited, supra,* the Board concluded that a driver's employment to haul excavated material away from a construction site in a dump truck would be employment in the construction industry even where, as appears to have been the situation in that case, the driver's employer was not involved in any other construction activity at that site.

26. The term "sector" is defined in clause 117(e) of the Act:

> "sector" means a division of the construction industry as determined by work

> characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and water mains sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector;

In *Steen Contractors Limited,* [1989] OLRB Rep. Nov. 1173, the Board observed that the characteristics of excavation work are a function of the purpose of the excavation. Adapting the like observation in the *Steen* decision at paragraph 12 to the circumstances of this case, we think it would be anomalous to conclude that excavation for the construction of a sewage treatment plant and the actual construction of such a plant fall within different sectors of the construction industry.

It would also be anomalous if the hauling of excavated material fell within the ICI sector while the truck was on the site but slipped into some other, unidentified sector when a truck left the site in order to dump a load of excavated material. If the construction of the sewage treatment plant at the Green Creek site falls within the ICI sector, as we are to assume for the purpose of this decision, then the excavation work and the associated hauling of excavated material both on and off site also fall within the ICI sector.

27. In short, we are persuaded that on the tests applicable before 1978 (and on the assumption that the Green Creek project was a construction project in the ICI sector of the construction industry), the drivers in question here were employed in the ICI sector of the construction industry while hauling excavated material to off site locations.

28. Amendments to the Act in 1978 (with significant modifications in 1980) introduced province-wide bargaining in the ICI sector of the construction industry, pursuant to what are now sections 137 to 151. The central theme of those provisions is that for all but a few independent unions in the construction field, there is to be one set of negotiations every two years with respect to all workers for whom a particular craft union or any of its affiliated locals has bargaining rights. This bargaining takes place between an employee bargaining agency representing the craft union and its affiliated locals, and an employer bargaining agency representing all employers for whose employees any of those unions hold bargaining rights. These two bargaining agents are not selected by the parties to be bound; they are designated by the Minister of Labour under subsection 139(1) of the Act. The Minister's designation determines the statutory bargaining authority of those bargaining agents. The result of their bargaining is a "provincial agreement" (clause 137(1)(e) of the Act).

29. The many unions and employers parties who became subject the province-wide bargaining scheme had a variety of bargaining practices before that scheme was imposed. The statutory scheme required a substantial departure from many of those practices, particularly for parties whose bargaining was entirely local or who bargained collective agreements without regard to the sector in which the work was performed. As a review of the Board's decisions in this area since 1978 would quickly reveal, the precise effect of the statutory provisions chosen to implement province-wide bargaining was not always apparent to all those affected by it. The meaning and effect of those provisions has been explored and elaborated by the Board on an on-going basis ever since they were introduced, in the course of litigation brought before it in circumstances like these, where parties have been unable to negotiate their own answer to a question which must then be adjudicated with reference to the relevant statutory provisions as well as those of the parties' agreements.

30. It is central to the scheme of provincial bargaining established by the Act that there be

only one collective agreement with respect to the employees described in the designation of an employee bargaining agency: the provincial agreement that employee bargaining agency makes with the corresponding employer bargaining agency. Subsection 146(2) of the Act prohibits employers and trade unions, among others, from making any other collective agreement or arrangement affecting those employees:

> 146(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.
>
> (2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement that does not comply with subsection (1) is null and void.

The language of subsection 146(2) is clear and very restrictive. The Board has repeatedly interpreted it to mean precisely what it says and refused to give effect to local agreements which purport to supersede, modify or exclude the application of the provincial agreement: see *Rockwell Concrete Forming (London) Limited,* [1988] OLRB Rep. Sept. 963, particularly at paragraphs 17-20, as well as *The Board of Education for the City of Windsor,* [1988] OLRB Rep. Mar. 342, *Inscan Contractors (Ontario) Inc.,* [1986] OLRB Rep. May 640, and *Roy Construction and Supply Company Limited,* [1982] OLRB Rep. Sept. 1332.

31. One of the significant consequences of the scheme of province-wide bargaining established by the Act is described in this passage from *Ellis-Don Limited,* [1988] OLRB Rep. Dec. 1254:

> 44. The designation orders issued pursuant to section 139(1) of the Act describe the provincial units of employees contemplated by the province-wide collective bargaining scheme established by the Act for the ICI sector of the construction industry in terms of trades and designate, for each such bargaining unit, an employer and employee bargaining agency. In effect, such orders designate the trade(s) which "belongs" to each employee bargaining agency and its affiliated bargaining agents. *Employee bargaining agencies, and their affiliated bargaining agents, can only represent, in the province-wide ICI collective bargaining scheme, those employees who are in a trade they have been designated to represent (see Ninco Construction Ltd.,* [[1982] OLRB Rep. Nov. 1692 July 1104]; *Manacon Construction,* [1983] OLRB Rep. Mar. 407, *Superior Plumbing and Heating Ltd.,* [1986] OLRB Rep. OLRB Rep. Nov. 1589; *D. E. Witmer Plumbing and Heating Limited,* [1987] OLRB Rep. Oct. 1228).
>
> [emphasis added]

An affiliated bargaining agent cannot represent a worker employed in the ICI sector of the construction industry unless that worker falls within the scope of its designation under subsection 139(1) of the Act (or of an express exclusion authorized by subsection 139(2)).

32. On April 24, 1978, the then Minister of Labour designated the Teamster employee bargaining agency to represent

> all teamsters engaged on on-site construction represented by the following affiliated bargaining agents:
>
> 1. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; or
>
> 2. The Teamsters Construction Council of Ontario; or
>
> 3. The following local Unions: 91, 141, 230, 879, 880, 990; or
>
> 4. Any other local of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which, in the future, may be chartered to represent all teamsters engaged on on-site construction.
>
> (which Council and Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid all employees bound by or parties to:
>
> (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
>
> (b) voluntary recognition agreements with the Unions or any of them;
>
> (c) collective agreements to [sic] which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

We note that the part of the designation which follows the words "without limiting the generality of the foregoing" does not employ the adjective "on-site."

33. On April 24, 1978, the then Minister of Labour also designated the Construction Site Employer Bargaining Agency to represent

> all employers whose employees are represented by the following affiliated bargaining agents:
>
> 1. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; or
>
> 2. The Teamsters Construction Council of Ontario; or
>
> 3. The following local Unions: 91, 141, 230, 879, 880, 990; or
>
> 4. Any other local of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which, in the future, may be chartered to represent teamsters engaged on on-site construction.

> (which Council and Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid all employees bound by or parties to:
>
> (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
>
> (b) voluntary recognition agreements with the Unions or any of them;
>
> (c) collective agreements to [sic] which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

We note that this designation does not use the adjective "on-site."

34. Counsel for the respondent employer submits that the designation of the Teamster employee bargaining agency does not cover teamsters hauling excavated material to off site locations. She argues that the Minister might have left such drivers out of the designation in order to preserve or leave room for the kind of arrangements referred to in evidence, whereby the terms of local agreements are applied on an all sector basis to hauling of excavated material off site. The difficulty with this argument is that it was not within the Minister's power to preserve local bargaining by affiliated bargaining agents with respect to work which falls within the ICI sector of the construction industry. As we have already noted, an affiliated bargaining agent which is the subject of a designation cannot acquire bargaining rights with respect to any person employed in the ICI sector who does not fall within the scope of that designation: *Manacon Construction*, [1983] OLRB Rep. Mar. 407.

35. The definition of "construction industry" in clause 1(1)(f) of the Act was not changed when province-wide bargaining was introduced. The test for whether a worker is employed in the construction industry remains the same as it was before 1978. The Board's analysis in *Cedarhust Paving Co. Limited, supra,* remains relevant, persuasive and applicable in resolving that question with respect to truck drivers. Nothing in the province-wide bargaining provisions themselves makes the drivers in question here any less employed in the ICI sector of the construction industry than they would have been had those provisions not been introduced. If the Minister's 1978 designations did not encompass some drivers employed in the ICI sector of the construction industry, then the Minister thereby precluded the various manifestations of the Teamster's Union from representing those drivers, drivers whom they had been able to represent before the province-wide bargaining scheme was introduced. It seems most unlikely that the then Minister intended her language to have that effect; there is certainly no evidence that she had that intention or that there was any reason for her to have formed that intention.

36. In our view, the adjective "on-site" in the phrase "teamsters engaged on on-site construction" in the designation modifies the word "construction", not the word "Teamster." "Engaged" means the same as "employed", and a teamster may be employed on on-site construction while away from the site in the same way that he or she may be employed in the construction industry in those circumstances. In other words, "engaged on on-site construction" means "employed in the construction industry" in the sense the Board elaborated in *Cedarhust*, when it took into account the effect of the words "at the site thereof" in the definition of "construction industry." The need for the "on-site" connection thus identified in *Cedarhust* may have been expressly

noted in the designation simply to make it clear that teamsters whose employer's only connection with a construction site is as supplier of materials to others would not be covered by the provincial agreement.

37. The foregoing analysis establishes this: the drivers in question were "teamsters engaged in on-site construction" within the meaning of the Ministerial designation which conferred statutory bargaining authority on the Teamster employee bargaining agency. In our view, the question before us – whether those drivers fall within the scope of the Teamsters provincial agreement – must be assessed against that background.

38. Counsel for the applicant argues that, having regard to the context in which it is used, the phrase "on-site Teamsters" in the Teamsters provincial agreement means the same thing as the phrase "teamsters engaged in on-site construction" in the Minister's designation of the Teamster employee bargaining agency. Counsel for the respondent argues that the adjective "on-site" should be applied literally, so as to exclude a driver while he or she is physically off the site. She also argues, however, that because the drivers in question spent such a large portion of their working time off site they should not be regarded as having been "on-site Teamsters" even during the periods when they actually were on site. Having regard to this latter argument, it may be said that both sides agree that the adjective "on-site" should not always be applied literally.

39. It is suggested that the evidence demonstrates an understanding between employers and the union since 1978 that hauling excavated material to off-site locations was not part of the work referred to in the Teamsters provincial agreement. This proposition is supported by the further suggestion that the evidence indicated that the number of employees "employed under" the Teamsters provincial agreement have been very few in number.

40. The fact that few employers have remitted the industry fund levy to the employer bargaining agency can be given no weight in assessing whether the Teamsters provincial agreement applies to drivers hauling excavated material away from ICI construction sites. There is more than one possible reason for it. At best, it is evidence of a hearsay nature that some unidentified employers believe they are not obliged to make that remittance. That may reflect nothing more than acceptance of the belief of Mr. Pilat who, if asked, would have told an employer of drivers hauling excavated material to off site locations that those drivers would not be covered and that it therefore did not have to pay the levy with respect to its employment of them. In any event, someone's belief about the meaning or application of the agreement is irrelevant unless offered in support of its truth, and for that purpose it should be given no weight when there is no way to ascertain and permit cross-examination on the basis of the belief.

41. The evidence does establish that, in practice, a Teamster local might well forebear enforcing the ICI agreement against an employer doing ICI construction work in its geographic jurisdiction if the employer acknowledges the local's representational rights with respect to drivers employed in the ICI sector and honours the terms of another agreement with the local in the employment of those drivers in the ICI sector. This would explain why the issue raised here might not have been litigated earlier. No-one could identify any previous situation, other than the one which gave rise to the Van Bots grievance, in which it was alleged that an employer bound by the Teamsters provincial agreement had caused or permitted work of the sort in question here to be performed by drivers not employed on terms satisfactory to the Teamsters local with geographic jurisdiction where the work was performed. Here, that local was the applicant, Local 91, with whom the respondent had no agreement other than the provincial agreement.

42. Whatever other effect they might have had, though, these local arrangements between

employers and local unions cannot have brought the employment of drivers employed in the ICI sector within the scope of a local agreement covering other sectors. No agreement except a provincial agreement may address the employment of workers employed in the ICI sector of the construction industry for whom an affiliated bargaining agent holds bargaining rights. Only the designated employer and employee bargaining agencies can make a provincial agreement. Only the agreement of those agencies could have determined whether drivers of the sort in question here were included in or excluded from coverage by the provincial agreement.

43. Furthermore, no agreement, understanding or arrangement between the employer and employee bargaining agencies or between employers and unions affected by their collective bargaining could alter the meanings of the statutory terms "construction industry" and "commercial, industrial and institutional sector." No such agreement could alter the scope of the designations made under section 139 or the statutory bargaining authority and responsibility which those designations imposed on the employer and employee bargaining agencies. Although the employer and employee bargaining agencies could have agreed that while working in the ICI sector some drivers would receive the wages, benefits and working conditions specified in local agreements covering other sectors, they could not cause those drivers to fall within the scope clauses of those other agreements. Even if the employer and employee bargaining agencies had agreed that some drivers employed in the ICI sector of the construction industry would not be covered by the provincial agreement, drivers of that sort for whom the Teamsters union or one of its locals had bargaining rights still could not have been "covered" in any enforceable way by any other agreement.

44. The employer and employee bargaining agencies came to the bargaining table authorized and obliged to bargain with respect to terms and conditions of employment of all "teamsters engaged on on-site construction" for whom the Teamster employee bargaining agency or its affiliates had bargaining rights in the ICI sector of the construction industry. They made an agreement in which the employer bargaining agency recognized the employee bargaining agency (referred to as "the Union") as "the exclusive Bargaining Agent for all on-site Teamsters for whom the Union has bargaining rights in the ICI sector of the Construction Industry in the Province of Ontario," with certain exceptions. Counsel for the respondent asks us to conclude that when they adopted those words the parties excluded from the agreement some "teamsters engaged on on-site construction" for whom the Union had bargaining rights. Counsel for the respondent did not suggest that the parties *intended* to exclude from the agreement some teamsters whose employment fell within the scope of their bargaining authority. We were not offered any reason why they might have shared such an intention. There was no evidence that they did. Indeed, Mr. Marinelli's evidence supports the opposite conclusion.

45. Given the statutory framework within which their negotiations take place, we should not be quick to conclude that the direct participants in provincial bargaining have failed to exercise their statutory authority with respect to some employees who fall within the scope of their designations. In all the circumstances, and in the absence of any evidence that any difference between "on-site Teamsters" and "teamsters engaged on on-site construction" was ever discussed at the bargaining table, it is not unreasonable to suppose that the parties intended the language they adopted to be co-extensive with the language of the designations. This is an entirely reasonable supposition even if, as it appears, the parties held different views as to the scope of those designations. The resolution of that difference in the applicant's favour in this case does not amount to conferring on it bargaining rights it did not previously have.

46. We find that the phrase "on-site Teamsters" in the collective agreement does not mean anything different from the phrase "teamsters engaged on on-site construction" used in the desig-

nation of the Teamsters employee bargaining agency. Having found that the drivers in question here were "teamsters engaged on on-site construction" when employed to haul material excavated on-site to both on-site and off-site dump sites, we find that drivers of the respondent when hauling excavated material on and from the Green Creek project fell within the scope of, and were therefore covered by the terms of, the Teamsters provincial agreement.

47. The parties are to advise the Registrar whether they require any further hearings in this matter. If no request to relist this matter for hearing is made within one year of the date hereof, this proceeding will be considered terminated.

DECISION OF BOARD MEMBER M. VUKOBRAT; April 24, 1991

1. I draw the following conclusions from the evidence presented to the Board on the above case.

1) The Board was asked to assume without conceding that the Construction Project known as the Green Creek Project in Ottawa falls within the I.C.I. sector of the construction industry.

2) The hauling of excavated material on-site is work covered by the Construction Site Teamsters Provincial Agreement.

3) The hauling of excavated material off-site is not work covered by the Construction Site Teamsters Provincial Agreement. The language of the Construction Site Teamsters Provincial Agreement is very specific insofar as it mentions only on-site and does not mention hauling excavated material off-site.

4) The Designation in 1978 by the Minister of Labour specifically states "engaged on on-site". It makes no mention of off-site.

5) In my opinion there has been a clear understanding between employers and the union since 1978 that indicates hauling off-site was not part of the work referred to in the Construction Site Teamsters Provincial Agreement. Other agreements have been used to cover off-site hauling throughout the Province.

6) The testimony of both parties indicated that the number of employees employed under the Construction Site Teamsters Provincial Agreement are and have been very few in number. I conclude, therefore, it has obviously been understood by both parties that off-site hauling is not covered by the Construction Site Teamsters Provincial Agreement but by other Agreements in the industry.

7) It is my opinion that the union has been attempting to expand its bargaining rights with respect to the Construction Site Teamsters Provincial Agreement and having failed to do so has asked the O.L.R.B. to do its work for them.

8) In conclusion only that portion of hauling on-site on this project (approximately 10-15%) is covered by the terms of the Construction Site Teamsters Provincial Agreement.

REASONS FOR CONCLUSIONS IN MY DECISION:

1) With respect to the excavated work performed, i.e. digging a hole into which other contractors will later place some structure, it should be noted and understood that additional excavations by others would be required in order to excavate trenches, etc. for footings. This was indicated by the contractor's evidence.

   The contractor (Farry Excavating and Grading Ltd., Mr. Farry Longo) testified that the tender documents called for all excavated material to be hauled off-site and it was only after excavations commenced that the general contractor determined that some of the excavated material was suitable for use as back fill at a later date. This resulted in approximately 10 to 15% of the excavated material to be hauled on-site and stored for future use as back fill for structures, etc.

2) Mr. Pilat's testimony indicates that the Teamsters Provincial agreement is predominately used in Sarnia and seldom used in other areas of the Province, except for physically large construction sites having many acres of area, such as large mega projects constructed by companies like Bechtel and Lumus. Hauling on-site on these projects entails the use of excavated materials often for the purposes of constructing other facilities such as brine ponds and dikes as is the case with chemical plants.

   Mr. Pilat was quite specific when he stated his belief and understanding that the Teamster's Provincial agreement does not apply to drivers hauling excavated material from a construction site to off-site locations. He again further stated that there were very few occasions when drivers were covered by the agreement. Mr. Pilat further testified that when material was hauled off-site from these types of projects, that it was always done under-over the road agreements or road agreements.

   My understanding of over the road agreements is that they are trucking agreements and the road agreements refer to agreements utilized by contractors working on property surrounding I.C.I. buildings, but under terms and conditions of non I.C.I. collective agreements such as;

   - Road and Parking lot agreements
   - Sewer and Watermain agreements
   - Utilities agreements
   - Heavy Engineering agreements

3) The absence of discussion during 1980, negotiations as to whether drivers were covered by the agreement when hauling material off-site indicates to me that there always was an agreement that hauling off-site was not covered by the Teamster's Provincial Agreement.

4) The union made proposals in 1982 and 1988 requesting that an expansion to their jurisdiction of the Teamsters Provincial agreement should include the delivery of materials to and from construction sites covered by the agreement. The absence of any suggestion by Mr. Pilat that the status of drivers hauling excavated

material to off-site locations was specifically discussed does not concede that those drivers were covered by the Teamster's Provincial agreement. To the contrary, in my opinion, it supports the argument that there was always a clear agreement that drivers hauling off-site were not covered by the Teamster's Provincial Agreement.

5) It is my further opinion that the view that there was an agreement between the parties is further confirmed by the fact that industry fund remittances received from the administrator of the union/management funds, indicated minimal employment requirements under the Teamsters Provincial agreement.

6) In my opinion "off-site" became a problem issue for 1990 negotiations as a result of a grievance filed against another contractor, Van Bots Construction, who as I understand it, is a general contractor who is not a signatory to any teamster agreement. It is my further understanding that, that is one of the primary issues in that case - i.e. that the contractor was not a signatory to a union agreement. That case appears to be much more complex than the issue of on-site, off-site.

   Since the Van Bots case was in question just prior to the 1990 round of bargaining, it was only then that the union formally requested a change to the scope of the Teamsters Provincial agreement, to add the words off-site. Although in my opinion there was a clear agreement of the scope and application of the Teamsters Provincial agreement between the parties, the union saw fit to advise the employer bargaining agency that they now had to make "off-site" a bargaining issue. In my view they took this action so that it would assist them (the union) in resolving a much greater problem resulting from the issues of the Van Bot's case.

7) Based on my understanding of the construction industry, a teamster hauling a load of gravel in a dump truck to a construction site and working under the terms of an over the road trucking agreement, does not become a construction worker when he arrives inside the confines of that construction site. He may, as is often the case, after the discharge of his load of gravel, pick up a load of excavated material to haul to another site. Is he then a construction worker? I would submit that of course *he is not.*

8) It is very often a construction employer's practice to perform work outside the construction industry as is the case when using his equipment such as dump trucks to haul materials under the over the road trucking agreements and to perform functions such as snow removal.

   I would submit that the union had a clear understanding of this requirement and has always understood that this type of work, i.e. hauling off-site is and should be done under other than the Teamsters Provincial agreement, i.e. over the road hauling or other agreements.

   Furthermore, based on my knowledge of the industry, many employers in the construction industry will make a call to a trucking company having dump trucks or to any company having dump trucks and operating under the over the road agreements or other agreements, to come and pick up a few or many loads of excavated material and to haul it off-site. In my opinion when this occurs there

has been a clear agreement by the union and by the employer that this was *not construction.*

What makes this case any different in that regard? Here we have a sub-contractor who is working for a general contractor and agrees to excavate a hole using employees working under the Operating Engineers agreement. He then brings employees, who he has always paid under the terms of a union agreement, other than the Teamsters Provincial agreement, to the site with the employer's dump trucks to pick-up the excavated material and to haul it off-site.

9) With respect to Mr. Marinelli's evidence for the union, he acknowledged that the union was content to have excavation contractors employ drivers in accordance with the terms of local agreements covering other sectors. This evidence in my opinion does reflect the clear agreement between employers and the union since 1978 that this work is not covered by the Teamsters Provincial agreement.

It is my opinion that it was only in 1990, when the union faced a potential problem with a contractor that was not employing union members (Van Bots), that they chose to attempt to expand their bargaining rights provincially. Having failed to do so, they have come to this Board so that this Board would do it for them.